Criminal Justice Notes

In this month's edition of KLS Criminal Justice Notes:

- **The Supreme Court of Canada decided a few weeks ago, in *Fleming v Ontario* [2019] SCC 45, that the common law in Canada did not recognise a police power to arrest a peaceful protestor in order to prevent a threatened breach of the peace from other persons angered by the protest.**

- **The Home Office seems set to introduce an Extradition (Provisional Arrest Bill) 2019 permitting the summary arrest of a wanted person in the UK, even though the case presented for the power affords little respect for the right to liberty relative to the interests of law enforcement expediency at home and abroad.**

Arrest for Anticipated Breach of the Peace

Context

From time to time the police have to deal with a situation in which one or a few persons exercising their right to engage in peaceful public protest attract a threat of violence and public disorder emanating from a much larger group of persons opposed to the protest. If the police intervene to avert the threat of violence by removing the few peaceful protestors, they risk being accused of favouring the more aggressive majority over the minority's right to protest peacefully. They may also be accused of being politically or culturally biased in the favour of the majority and hostile to the minority.

Historically, the UK courts have afforded the police a broad latitude in the use of their coercive powers to quell or prevent public disorder in such circumstances. They have not always been consistent or steadfast in upholding the rights of peaceful protestors against more aggressive opponents. In recent decades, however, the courts have been placing more emphasis on the importance of upholding the former's right to freedom of expression over the interests of police expediency. A few weeks ago, the Canadian Supreme Court had to engage with this issue in *Fleming v Ontario* [2019] SCC 45. It was asked to decide whether the common law in Canada recognised a police power to arrest a peaceful protestor in order to prevent a threatened breach of the peace from other persons angered by the protest.

The Facts

'Six Nations' protestors had occupied a piece of Crown land in Caledonia, Ontario, in the course of a long running land dispute between them and the Crown. Counter-protests by opposing groups had sparked violence in the past. On this occasion, the counter-protestors decided to hold a 'flag rally' in the vicinity of the occupied land. The police plan for dealing with the potential for disorder entailed keeping the rival protestors apart. To this end they

informed the 'flag rally' protestors that they were not to enter the occupied land.

On the day of the 'flag rally' protest, a police patrol encountered the complainant carrying a Canadian flag on the public road adjacent to the occupied land. They approached him with a view to forming a barrier between him and the 'Six Nations' protestors. He sought to avoid the patrol by entering onto the occupied land where he was about to be confronted by some of the 'Six Nations' protestors. A police officer told him that he was under arrest to prevent a breach of the peace. When he refused to drop the flag, he was wrestled to the ground, handcuffed and taken away. He was detained in a police cell for over two hours before being released.

The complainant sued the Province of Ontario and the police officers for damages for assault and battery, wrongful arrest and false imprisonment, and for breach of rights under the Canadian Charter of Rights and Freedoms. He succeeded at trial, lost in the Court of Appeal from which he appealed to the Supreme Court.

Critically, the police defence throughout was that they had been exercising a common law power of arrest to prevent an anticipated breach of the peace. A primary issue for the Supreme Court, therefore, was whether the common law recognised a police power of summary arrest to prevent an anticipated breach of the peace, even though the person arrested was not acting unlawfully at the time and was not personally threatening a breach of the peace. The Supreme decided unanimously that there was no such common law power. Accordingly, it upheld the appeal and awarded the complainant Can$140,000 and costs totalling almost Can$200,000.

Ancillary Powers Doctrine

At the outset, the Court noted that in discharging their important duties in a free and democratic society, the police will have to interfere with individual liberty from time to time. It is also firmly established, however, that upholding the rule of law requires strict limits on police powers to interfere with the liberty or property of the person. In determining those limits, the Court applies the framework of the 'ancillary powers doctrine' originally laid down by the English Court of Criminal Appeal in *R v Waterfield* (1963).

In substance the doctrine asserts that police actions interfering with the liberty of the person are permitted at common law if they are reasonably necessary for the fulfilment of recognised police duties. In Canada, it has been used as the basis to recognise some significant and regularly used police powers at common law, including: temporary roadside checks to detect motorists driving under the influence of alcohol; investigative detentions; searches incident to arrest; home entries; sniffer dog searches; and safety searches.

Before applying the ancillary powers doctrine to recognise a common law power, the Court must define the police power being asserted and the liberty issues at stake. If the power *prima facie* interferes with the liberty of the individual, the doctrine is brought into play. In that event, the Court will have to establish whether the police action in question falls within the scope of a recognised police duty, and whether it involves a justifiable exercise of police powers associated with that duty. It is only if the asserted power satisfies these 'ancillary powers' requirements that it will be recognised at common law.

The asserted power

The asserted power in this case is a power of arrest to prevent an apprehended breach of the peace even though the person targeted is acting lawfully in the sense that he has not committed and is not about to commit an indictable offence or a breach of the peace. The essence of a breach of the peace is violence entailing actual or threatened harm to someone. Mere annoyance, insult or disruptive or unruly behaviour, stopping short of actual or threatened violence, is not sufficient. Clearly, the complainant in *Fleming* was not arrested for committing or being about to commit a breach of the peace. He was arrested in the belief that removing him from the scene might defuse the situation, avert the threat of violence from others and even protect the complainant himself from harm. In other words, it was essentially preventative in nature.

Interference with liberty

The Court had no difficulty in finding that the asserted power of arrest entailed a substantial interference with the liberty of the person. Placing a person under arrest takes away his or her freedom to move around in society free from State coercion. The use of force to effect the arrest is also an intrusion on the individual's right to bodily integrity and security, and on the right to be free from the exercise of force by the State. In the particular circumstances of this case, the arrest power also entailed interference with the right to freedom of expression as guaranteed by the Canadian Charter on Rights and Freedoms. Taken as a whole, it directly impacted upon a "constellation of rights that are fundamental to individual freedom in our society."

Valid police duty

With the scope of the power defined and the interference with liberty established, it remained for the Court to determine whether, in accordance with the ancillary powers doctrine, such a power would be justified for the purposes of fulfilling a valid police duty. The next question, therefore, is whether the asserted police power is linked to a valid police duty. The Court had no difficulty in answering that question in the affirmative. Preserving the peace, preventing crime and protecting life and property are firmly established as principal police duties at common law. Preventing breaches of the peace is clearly encompassed by those duties.

Justification

The more difficult question is whether the asserted power of arrest is justified or reasonably necessary for the purpose of fulfilling that duty. The Court noted that the standard justification must be commensurate with the fundamental rights at stake. To put it another way, there must be minimal impairment of the rights in question, and there must be proportionality between the object sought to be achieved by the power and the degree of interference with those rights.

The Court identified three reasons why the standard of justification for this particular power is especially stringent and difficult to satisfy. The first is that the power is expressly applied to someone who is not suspected of any criminal wrongdoing or even threatening to breach the peace. That contrasts with the norm in which arrest powers are, at most, directed at persons against whom there is a suspicion that they have committed, are committing, or might commit, a criminal offence. In the Court's words, "[i]t would be difficult to

overemphasise the extraordinary nature of this power". It would "constitute a major restriction on the lawful actions of individuals in this country." The Court also emphasised the importance of guarding against intrusions on the fundamental liberty of individuals who were neither accused nor suspected of committing a crime. Quoting from Lord Mance in the English case of *Laporte* (2006), it said that police preventive action should be focused on those who are acting disruptively, not on innocent third parties.

The second reason why the asserted power is subject to stringent justification is that it is preventative in nature. It is targeted at preventing a breach of the peace before breach has taken place. The Court acknowledged that the ancillary powers doctrine does not preclude the possibility of proactive police intervention in preserving the peace, preventing crime and protecting life and property. Where such actions intrude upon the liberty of the individual, however, courts must be very cautious to avoid authorising them on the basis of vague or overly permissive standards.

The third reason is that exercise of the asserted power is "evasive of review." Since such an arrest does not normally result in the preferring of criminal charges, the person concerned is deprived of a forum to challenge its legality, other than through an expensive civil suit.

Taking all these factors together, it is clear that the standard of justification for extending the ancillary powers doctrine to the power asserted in this case will be onerous. The police will carry a heavy burden to establish that it is reasonably necessary.

Applying the doctrine

In applying the ancillary powers doctrine stringently to the asserted power, the Court proceeded on the basis that preserving the peace and protecting people from violence is an immensely important police duty. It also accepted that there may be exceptional circumstances in which some interference with liberty is required in order to discharge that duty. Arrest, however, is such an extreme intrusion on liberty that it can only be justified if it is necessary in order to prevent a breach of the peace from occurring. Where less invasive measures are available, they must be taken.

The Court could not conceive of circumstances in which a common law power of arrest would be required in order to prevent a threat of future violence from materialising. Other lesser options are available and should be taken. Under Canadian law, for example, it is an offence to restrict or wilfully obstruct or assault a police officer in the execution of his or her duty. This carries a statutory power of summary arrest. So, a police officer already has the power to defuse a potentially violent situation by less intrusive actions, such as giving instructions to one or more individuals to leave the scene or desist from specified conduct. Resistance or obstruction will amount to a criminal offence for which the individual can be arrested. In that event, however, the power of arrest is linked to an offence that has actually been committed, as distinct from lawful behaviour which may provoke others to resort to violence.

Given these other less intrusive options, the Court concluded that it was not reasonably necessary to recognise another common law power of arrest to prevent an anticipated breach of the peace. The mere

fact that police action is effective in preventing a breach of the peace cannot be relied upon as a justification if it entails interference with the liberty of the individual. The test is whether it is reasonably necessary. If a breach of the peace can be achieved by an action that intrudes less on liberty, a more intrusive measure will not be reasonably necessary no matter how effective it may be. Sanctioning significant infringement on the liberty of the individual on the basis of its effectiveness is "a recipe for a police state, not a free and democratic society."

Accordingly, the asserted common law power cannot be justified under the ancillary powers doctrine. There is no such power. Since the police relied on the asserted common law power to arrest the complainant, it follows that his arrest was unlawful.

Comment

On the face of it, the decision in *Fleming* may seem a significant victory for the right to liberty and freedom of expression over police power. It certainly represents a solid re-affirmation of the basic principle that police actions encroaching on the liberty of the individual must be based on established law. The fact that the common law in Canada does not recognise a police power to arrest an individual who is not acting unlawfully or threatening to act unlawfully will not cause surprise in the UK where decisions, such as that in *Laporte* (2006), have precluded premature police encroachments on liberty and freedom of expression in the name of public order. The common law does not permit the police to deprive a law-abiding individual of his liberty simply because they deem it expedient to do so in order to neutralise a future threat of violence from hostile third parties. This applies even where the complainant, as in *Fleming*, has provoked the threatened breach of the peace by his words or actions.

It does not follow that the decision in *Fleming* seriously restricts the tools available to the police to preserve the peace or maintain public order. The reality is that Canadian legislation (and common law), as in the United Kingdom and Ireland, confers the police with broad summary powers to maintain public order. In *Fleming*, the essential police error was a failure to proceed initially by taking action short of arrest to protect the complainant from the risk of violence provoked by his actions. Had they attempted to do that, and the complainant failed to cooperate, the police could have arrested him lawfully for obstruction of a police officer in the execution of his duty.

Finally, the decision in *Fleming* does not close off the possibility of a common law power of arrest where it is reasonably necessary to arrest a person acting lawfully because there are no lesser options at common law or in legislation to prevent violence from occurring. Given the wide availability of lesser options which should be used initially where possible, it will be a rare situation in which it will be necessary to resort to such an arrest as the first response. It is also worth noting that the decision in *Fleming* does not preclude the possibility of a common law police power to arrest an individual in order to prevent a breach of the peace, where it is the individual himself who is threatening to breach the peace. The Court declined to declare a position on that, preferring to leave it to another day when the issue arises for decision on the facts.

Extradition and Summary Arrest Power

Context

The UK Home Office is about to bring forward an Extradition (Provisional Arrest) Bill 2019 that will give police a power to arrest persons without warrant (summary arrest power) at the request of law enforcement authorities from certain "trusted" countries. Currently, such a summary power is available only in respect of persons who are the subject of a European Arrest Warrant (EAW) issued by a judicial authority in another EU Member State. The new power, therefore, is being introduced with an eye to retaining the current arrest arrangement in respect of EAWs issued by EU Member States should that otherwise be lost as a result of the UK exiting the EU.

Equally, however, the proposed legislation will have the effect of extending the availability of the summary power to a wider range of "trusted" States outside of the EU. The effect is that any police officer will be able to arrest a wanted person in the UK in order to facilitate proceedings against that person in such a State. There will no longer be a need for prior judicial authorisation and scrutiny in respect of the arrest in the UK.

The Bill has not yet been published. Nevertheless, its likely contents can be gleaned from the briefing documents for the Queen's Speech setting out the government's legislative agenda for the next session of the UK Parliament, together with the associated 'Impact Assessment' on the power. The latter was completed on the 1st October (although not published until the 22nd October), suggesting that this power has been in gestation for some time.

Interpol Red Notice

There would appear to be two pre-requisites for the exercise of the summary arrest power. The first is that an extradition alert, such as an Interpol Red Notice, must have issued for a serious offence in respect of the person concerned. An Interpol Red Notice is not an international arrest warrant. It is a Notice published by Interpol at the request of a member State requesting law enforcement authorities worldwide to locate and provisionally arrest a specified person for a specified offence pending extradition or surrender to the requesting State. Accordingly, the availability of the arrest power is not predicated on an extradition warrant in respect of the person actually having arrived in the UK. It is more in the nature of a pre-emptive power.

The wisdom of relying on the publication of an Interpol Red Notice as a basis for a summary power of arrest in the UK must be questioned. There is growing concern internationally that these Notices are increasingly being used by some States to pursue fleeing refugees, political opponents or human rights activists. The risks associated with that may be offset to some extent by the second pre-requisite (below), but that still leaves room for doubt.

Serious offence

It remains to be seen what will qualify as a serious offence for the purposes of the arrest power. A relatively low gravity threshold applies for extradition offences generally in the UK. There is an implication, however, that the proposed summary arrest power will only apply to the more serious of those offences. Nevertheless, it is difficult to be any more precise about their scope at this stage. The Impact Assessment

for the legislation gives a very loose indication that it will target offences such as murder, sexual offences, other violent offences against the person, child exploitation, drug offences, theft and fraud. Even some of these embrace broad categories of conduct, and it is highly likely that the qualifying offences will be wider.

National Crime Agency

Interestingly, it seems that the National Crime Agency (NCA) will be relied upon to confirm that an Interpol Red Notice (or other extradition alert) has been issued in relation to a serious offence and that it is from a "trusted partner country". If followed through in the legislation, this would be an unusual development. Typically, police powers of arrest are defined in law and exercisable directly at the discretion of an individual constable. In this case, the availability of the power in any given case will be determined by the executive choice of the NCA.

Trusted partner country

The second pre-requisite for the exercise of the power is that the extradition alert must come from an agency in a "trusted partner country". Presumably, the legislation will empower the Secretary of State to designate "trusted" countries by order. It is not wholly clear what criteria will be applied. The briefing notes for the Queen's Speech suggest that these will be countries that respect the "international rules-based system" and whose Red Notices and criminal justice systems the UK trusts. That, of course, leaves much political discretion to the Secretary State.

It seems that the list of "trusted" countries will almost certainly include: the European Free Trade Association countries (Iceland, Liechtenstein, Norway and Switzerland) and the 'Five Eyes Countries' (Australia, Canada, New Zealand, UK and USA). It should be noted that the latter (apart from the UK) are not parties to the European Convention on Human Rights, and the USA still retains the death penalty in some of its States. There is also an implication that all EU Member States will be designated as "trusted" for this purpose in a post-Brexit scenario, even though there is increasing concern about human rights standards in some of their criminal justice regimes. The Secretary of State will have the power to add countries to the list, but exercise of that power will be subject to parliamentary approval.

Detention post-arrest

Once a person has been arrested under the power, he or she must be brought before a court within 24 hours. At first sight, that might appear to be protective of due process and the rights of the person concerned. It must be asked, however, why it is necessary to allow the police to detain the person for up to 24 hours before bringing him or her before a court. If the arrest power was based on a warrant, the arrested person would normally have to be brought before an independent judicial authority as soon as reasonably practicable. The police would not be allowed to hold on to him or her for investigative purposes. It is not clear why a summary power linked to extradition, as distinct from domestic criminal process, should be any different. A more rights-sensitive approach would be a requirement to bring the arrested person before a court as soon as reasonably practicable and, in any event, no later than 24 hours.

Existing power

This proposed summary power of arrest seems to be an excessive and unnecessary concession to law enforcement expediency

and, in particular, the interests of the security and law enforcement authorities in some favoured foreign countries. For the purpose of securing the arrest of a wanted person, they will be put on the same footing as parties to the EAW regime, even though they are not subject to the broader checks and balances that inform that regime. Significantly, there already is generous provision in UK law for the arrest of a person wanted by the law enforcement authorities in a country that is not party to the EAW regime.

The Extradition Act 2003 Act, for example, provides for the provisional arrest of a wanted person even before an extradition request has issued or arrived from the requesting country. A Justice of the Peace can issue a warrant for the arrest of the person if the Justice has reasonable grounds to believe that the offence in question is an extradition offence, and that there is written information which would justify the issue of an arrest warrant if the person was accused of having committed the offence in the UK.

The involvement of the Justice of the Peace in the existing power provides an important judicial protection for the liberty and rights of a person in the UK. This is especially important given that the person is innocent under the law in the UK, and is not even suspected of an offence under UK law. Nevertheless, the preliminary judicial check does not seriously limit the capacity of the UK authorities to assist another State in enforcing the latter's criminal process against a person in the UK. So, for example, an application for the arrest warrant is considered and determined *ex parte* (i.e. without notice to the person affected). Also, once issued, the warrant can be executed by any constable (even if not in possession of the warrant) to arrest the person anywhere in the UK.

Clearly, there already is a reasonable and practicable route for the UK police to arrest a person in the UK on behalf of the authorities in another State who want to secure his or her extradition. The case for extending this to a summary power, with the associated encroachment on respect for the individual's right to liberty, is not immediately obvious. It would appear that the underlying objective is not just to retain the current EAW-linked power in the event of it otherwise being lost in a post-Brexit environment, but also to extend and normalise it for the benefit of other favoured countries. Equally, it is apparent from the Impact Assessment that the summary power is seen as delivering resource efficiencies for UK law enforcement agencies, relative to the costs and burdens of the more 'rights friendly' warrant power.

The Impact Assessment

The Impact Assessment carried out for the proposed arrest power raises some issues that may be of even deeper concern than the substance of the power itself. Throughout the Assessment, the wanted person is persistently referred to as an "offender". So, for example, the intended effect of the power is to "reduce reoffending by serious and organised criminals". This totally ignores the fact that most extradition requests are for persons who are suspected of an offence, as distinct from having been convicted of an offence. As such, they are entitled to the presumption of innocence. The Impact Assessment, however, is framed on the premise that they are dangerous criminals who present a serious risk to the UK public if they are not arrested quickly and with the minimum of process and expense.

Indeed, in citing "other key non-monetised benefits", the Assessment expressly states

that "expediting the arrest of these offenders may reduce harm to UK society, in terms of crimes that individuals could have committed had those individuals remained active". Not only are they presented as "offenders" rather than suspects in the requesting country, but it is assumed that they will proceed to offend further (sic) in the UK! The Impact Assessment also states that the summary power will result in the police spending less time and resources on investigating, pursuing and obtaining warrants "for serious offenders".

Another concern is that it is estimated that the addition of the proposed summary arrest power will result in an average of a mere six persons entering the extradition process more quickly than would otherwise have been the case. Incredibly, the Assessment states that these individuals "may have gone on to re-offend" in the absence of an immediate arrest at the moment when the police became aware of their presence. Equally, it states that the proposed summary power will "remove the opportunity for this re-offending, thereby avoiding the economic and social cost" of such offending. Whatever credibility might attach to such speculative risks and minimal savings, it is ultimately dashed by the acknowledgment that the numbers of prevented re-offending will be small and that it is "unclear how much re-offending will be prevented." It is difficult to take the case for the new summary power of arrest seriously when it is presented and justified in such a confused and unbalanced manner.

Conclusion

The proposed introduction of this summary power of arrest represents yet another concession to executive expediency and the self-serving interests of law enforcement agencies at home and abroad at the expense of the individual's right to liberty. The Impact Assessment for the proposed power offers an illuminating window into the thinking that would appear to be driving such concessions. Persons wanted in other States on suspicion of having committed an offence there are presented without qualification as serious offenders who present a significant risk of "re-offending" here. There is no concession to the fact that these persons are entitled to the presumption of innocence, let alone the need to take it into account when assessing the case for the proposed power to deprive them summarily of their liberty. It does not instil much confidence in the capacity of the new administration to strike a reasonable and proportionate balance between the interests of law enforcement and the fundamental rights of the individual.